88-119

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1987

HERB LEVIN, d/b/a LEVIN BEAUTY SUPPLY, and LEVIN BEAUTY SUPPLY, INC.

Petitioners,

vs.

REDKEN LABORATORIES, INC.,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Judge Barbara K. Hackett, District Judge, Eastern District of Michigan, found the Petitioner in Contempt of Court for violating a permanent injunction which prohibited the Petitioner from selling Respondent's products marked "For Professional Use Only." The only evidence which the Respondent produced during the Show Cause Hearing was a single witness who purchased 8 bottles of Respondent's hair care products at Petitioner's 2 stores. Without proof of damages, Judge Hackett awarded the Respondent $25,000 damages, ordered the Petitioner to post a $25,000 bond and pay the Respondent's costs and attorney fees. The District Court did not set a term or conditions for the return of the bond and made no determination as to the Petitioner's financial ability to procure the bond.

A Panel of the Sixth Circuit Court of Appeals affirmed the judgment of the District Court on the grounds that the award of damages was in accord with a bond set by another District Judge nearly 10 years earlier which was returned to the Petitioner 15 months after the bond issued. The Panel further held, without proof of actual damages, that the $25,000 bond of ten years earlier was a determination by the District Judge of the damages from a violation of the injunction.

The questions presented are:

1. After a finding of civil contempt for violating a permanent injunction, may a District Court impose sanctions against the contemnor without an evidentiary

hearing on damages and a determination of the financial ability of the contemnor without violating the contemnor's right to due process under the Fifth Amendment to the Federal Constitution?

2. Does the Federal Constitution require a District Court to apply State law in imposing sanctions for the violation of a permanent injunction issued in a diversity of citizenship action involving state claims?

3. Does the District Court's award of damages violate the Petitioner's right to Due Process under the Fifth Amendment to the Federal Constitution?

4. Did the Show Cause Hearing of the District Court comply with the Petitioner's right, under the Fifth Amendment to the Federal Constitution, to a fair hearing?

5. Does the decision of the Sixth Circuit Panel overlook, misconstrue and misapprehend material facts?

PARTIES

The Petitoner Herb Levin is the owner of two retail stores, namely, Levins Beauty Supply, Inc. in the City of Oak Park, Michigan and Levins of West Bloomfield, Inc. in the City of West Bloomfield, Michigan. All of Petitioner's retail business is conducted in the State of Michigan. The Petitioner's stores sell beauty care products to the public. The Respondent Redken Laboratories, Inc. is a manufacturer of beauty care products. Respondent's principal place of business is in the State of California.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

HERB LEVIN, d/b/a LEVIN BEAUTY SUPPLY, and
LEVIN BEAUTY SUPPLY, INC.

Petitioners,

vs.

REDKEN LABORATORIES, INC.,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioner respectfully prays that a writ of certiori issue to review a decision of a panel of the Court of Appeals for the Sixth Circuit affirming a judgment of the U.S. District Court, Eastern District of Michigan, Southern Division, which awarded Respondent $25,000 money damages, actual costs and attorney fees and

ordered the Petitioner to post a $25,000 bond in favor of the Respondent.

OPINIONS BELOW

The Order and Opinion of the District Court is annexed as Appendix D and is reported in 843 F2d 226 (1988). The decision of the Court of Appeals Panel which denied Petitioner's Petition for a Rehearing is annexed as Appendix I.

JURISDICTION

The Order of the Court of Appeals Panel denying the Petitioner's request for a rehearing en banc of the Panel's decision which affirmed the Judgment of the District Court was entered on May 16, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

Summary

In 1977, the Petitioner consented to a judgment which permanently enjoined the Petitioner from selling the Respondent's products marked "For Professional Use Only". On March 25, 1987, during a Show Cause hearing, the Petitioner was found to have violated the injunction, and without an evidentiary hearing or a proof of damages, the Petitioner was ordered to pay the Respondent $25,000 and post a $25,000 bond. The bond was set by the District Court without regard to a prior

determination of the Petitioner's ability to post the bond or an inquiry into the extent of damages in the event of a violation of the injunction. In an opinion containing errors of fact and facts not of record, a Sixth Circuit Panel affirmed the judgment of the District Court.

FACTS AND PRIOR PROCEEDINGS

In 1977, Respondent sued the Petitioner under diversity of citizenship alleging that the Petitioner had engaged in unfair competition by selling Respondent's goods marked "For Professional Use Only". All counts of the Complaint were state counts.

On June 10, 1977, a consent judgment was entered without damages permanently enjoining the Petitioner from selling the Respondent's products marked "For Professional Use Only". The judgment did not enjoin the Petitioner from selling the Respondent's retail products and the Petitioner continued to sell the retail products after the entry of the judgment. Three and one half months later, on September 27, 1977, Judge Ralph B. Guy, Jr., District Judge, Eastern District of Michigan, held that the Petitioner violated the injunction and ordered the Petitioner to pay $350 costs and post a $25,000 bond in favor of the Respondent. There is no record to show that damages were caused by the violation. Fifteen months later, on January 10, 1979, Judge Guy returned the bond. When Judge Guy returned the bond he said:

> "THE COURT: Very well, the Court is going to make this disposition in this matter.
>
> "It is going to allow the return of the bond money to the defendant.
> The Court feels that there has been a sufficient penalty suffered to cover the initial breach."

Judge Guy also said:

> "Secondly, the violation of the injunction initially so soon after its issuance was egregarious conduct on the part of the defendant. And if there was any repetition of that you could expect to be dealt with very harshly by this court insofar as contempt citations because you had one bite of the apple, and anything further would be construed as complete, purposeful and wilfull disregard and disdain of the lawful orders of this Court and would be dealt with accordingly."

Eight years later, Respondent's local distributor and the supplier of Respondents retail goods, without order, shipped some of the prohibited goods to the Petitioner. Unbeknown to the Petitioner, his clerks stocked them on the open shelves with thousands of other products. The appearance of the prohibited goods was deceptively similar to the retail goods which

Petitioner continuously sold the retail product for more than ten years and the trademarks and names of the products were identical. The only difference was of size and the words "For Professional Use Only" in small letters on the lower margins of the probibited products.

On January 9, 1987, on information from salon operators that the prohibited goods were in the Petitioner's stores, Respondent dispached its Contract Compliance Manager, Robert Allen, by aircraft from California to Michigan. The following day, January 10, Allen purchased a total of 8 bottles of hair shampoo, hair conditioner, and hair wave set. The following month, Petitioner was served with an Order to Show Cause, ordering the Petitioner to appear in Court for a hearing on March 25, 1987. A response was filed containing side-by-side comparisons of the retail and prohibited products to show the court that their appearances were deceptively similar. Also in the Response were Affidavits from the store managers stating that the goods were shipped to the stores without their order.

Respondent produced only a single witness, Robert Allen. Allen testified that the only investigation he made consisted of a telephone contact with one distributor the day before the hearing. The only evidence relating to the violation of the injunction was the 8 bottles of hair shampoo, hair conditioner and wave set which Allen purchased at Petitioner's stores. No testimony or other evidence was produced to substantiate Respondent's claim for damages. When Allen was questioned about damages, Allen answered:

BY MR. RHODES

> Q. Mr. Alan, insofar as damages, have you determined the extent of damages that Redken has suffered because of these sales?
>
> A. That's not my job function there, so, no, I have not."

Over the objections of Petitioner's attorney, the Court admitted a blank Distributor Agreement and a Policy Statement which were not previously disclosed to the Petitioner or his attorney. The documents threatened the distributors with a loss of distributorships for sales of either the retail or professional products to businesses other than salons. The Court allowed Respondent to use these documents for falsely representing that the Petitioner intentionally procured the prohibited goods from the "diversionary market".

The Petitioner attempted to defend himself against these false representations by offering into evidence invoices from Respondent's local distributor who supplied the Petitioner with the retail goods. The Court refused to admit the Petitioner's invoices on the grounds the invoices were incomplete. When Petitioner's counsel requested permission to bring the managers to court, the Court did not grant the request. Notwithstanding there was no showing of damages, at the conclusion of the hearing the Court said:

> "I'm awarding at this time $25,000 to the petitioner [Redken]. And I'm further

> reinstating the earlier $25,000 bond. That's a must. There's the award, plus a $25,000 bond to assure future compliance with the injunction which remains in place.
>
> The Court will award attorney fees, costs and expenses involved in bringing this motion."

The District Court did not set a time period for the bond or conditions for the return of the bond. Moreover, no determination was made as to the ability of the Petitioner to finance the bond. The Petitioner filed a request for reconsideration which the District Court denied. Appeal was taken.

On March 29, 1988, a Sixth Circuit Panel affirmed the judgment of the District Court in a decision which contained errors of fact and facts not of record.

REASONS FOR GRANTING THE WRIT

I.

THE IMPOSITION OF CRIMINAL SANCTIONS AFTER A FINDING OF CONTEMPT WITHOUT AN EVIDENTIARY HEARING VIOLATES THE DUE PROCESS GUARANTEE OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The words, "due process of law", Justice Curtis said in *Murray's Lessee et al V. Hokoken Land and Improvement Co.*, 18 Howard 272 (1855), "were undoubtedly intended to convey the same meaning as

the words, 'by the law of the land,' in Magna Charta". . . . The article [Fifth Amendment] is a restraint on the legislative as well as on the executive and judicial powers of the goverment. . "

In *Holden v. Hardy,* U.S. 366 (1897), citing Justice Miller in Davidson v. New Orleans, 96 U.S. 97, 8 the Court said, the "law of the land" implies a conformity with the "ancient and customary laws of the English people" and that the phrase "due process of law" . . . "forbid that one man's property, or the right to property, shall be taken for the benefit of another, or the benefit of the state, without compensation;" It is clear that the awarding of $25,000 to the Respondent without an evidentiary hearing or proof of damages was a flagrant violation of the Fifth Amendment to the Federal Constitution.

In *United States v. United Mine Workers of America*, 330 U.S. 258 (1946), this Court set standards for imposing sanctions on contemnors after a finding of civil contempt. The Court said that sanctions could be employed to either compensate the complainant or coerce the defendant into compliance with the Court's order. The Court said that where compensation is payable, it must be based on actual loss and where the purpose is to make the defendant to comply, it must consider the character and magnitude of the harm threatened and the effectiveness of the sanction in bringing about the desired result. It is clear that neither the District Court or the Court of Appeals applied these standards. Not only had thee been complete compliance with the injunction over a long period, the violation was

inadvertent and the Petitioner had come to Court to show the Court that there was no intent to violate the Court's order.

The Panel's ruling that the $25,000 award to the Respondent was in accord with the District Court's determination 10 years earlier when the Petitioner was ordered to post a $25,000 bond as an approximation of damages for a violation of the injunction is a misstatement of fact. The original action terminated with a consent judgment. There is nothing in the record to show that an evidentiary hearing on damages was held either prior to the entry of the consent judgment or when Petitioner was held to have violated the injunction three months later. When Judge Guy returned the bond 15 months later, he said 'There has been a sufficient penalty suffered to cover the initial breach.'The Court's sanctions are arbitrary, excessive and in no way related to the evidence adduced in Court. There is no evidence of damages because the injunction was violated. The only evidence relating to the violation was the sale of 8 bottles of the Respondent's hair shampoo, hair conditioner and wave set. Judge Hackett was of the opinion at the Show Cause Hearing that the $25,000 damages was appropriate because the injunction was violated.

When Respondent's only witness Robert D. Allen was questioned about damages, Allen answered:

BY MR. RHODES

Q. Mr. Alan, insofar as damages, have you determined the extent of damages

> that Redken has suffered because of these sales?
> A. That's not my job function there, so, no, I have not."

No consideration was given to Petitioner's strict compliance with the injunction for almost 10 years before the 1987 violation. In *General Signal Corp v Donallco, Inc.*, 787 F2d 1376, (6th Cir 1986), the 6th Ciruit said "substantial compliance with a court order is a defense to civil contempt". In *Tobin v Alma Mills*, 192 F2d 133 (1951), the 4th Circuit held that a 10 year observance of an injunction without substantial violation rendered prospective enforcement of the injunction inequitable.

The Sixth Circuit Panel was of the opinion that the $25,000 damages was in accord with the $25,000 bond of District Judge Guy which was returned and cancelled eight years before the violation occurred. The Sixth Circuit Panel's decision disregarded Judge Guy's comment when the Bond was returned after fifteen months, i.e., "there has been sufficient penalty suffered to cover the initial breach".

II

THIS COURT SHOULD DECIDE WHETHER THE FEDERAL CONSTITUTION REQUIRES A DISTRICT COURT IN A CONTEMPT PROCEEDING TO APPLY STATE LAW IN IMPOSING SANCTION FOR THE VIOLATION OF A PERMANENT INJUNCTION ISSUED IN A DIVERSITY OF CITIZENSHIP ACTION INVOLVING STATE CLAIMS

This case raises the constitutional issue of whether the Federal Constitution requires a District Court in a contempt proceeding to apply the substantive law of the forum state in imposing sanctions for the violation of a permanent injunction which issued in a diversity of citizenship District Court action involving state claims.

Over fifty years have passed since this Court handed down its landmark decision, *Erie Co. V. Tompkins*, 304 U.S. 64 (1938), wherein the Court held that except to matters governed by the Federal Constitution or Acts of Congress, the substantive law to be applied was the law of the state.

The District Court Action which resulted in the permanent injunction was brought by the Respondent in 1976 under diversity of citizenship and involved only state claims and sales which were confined to Michigan. The consent judgment entered in 1977 which enjoined the Petitioner from selling the Respondent's goods marked "For Professional Use Only" was based on a State count of unfair competition. If the case would have terminated with a trial on the merits, Respondent's recovery would have been decided by the substantive laws of Michigan relating to unfair competition. Under Michigan law, Respondent would not have been entitled to damages except upon a finding that the Petitioner was guilty of contempt, that the misconduct had caused actual loss or injury, and the amount of injury. *Montgomery v. Booming Co.*, 104 Mich 411 (1895).

Article X of the Federal Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 1652 of Title 28, United States Code, provides that "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The fact that the Federal Courts pay little heed to *Erie v. Tompkins*, Supra and 28 USC 1652, is evident from the decision of the Sixth Circuit Panel wherein it is said:

> "this case represents the proper issuance and enforcement of an injunction under Rule 65(a) against an identified party who has continued to injure another's legislatively protected and registered rights and property."

Would not the Constitution be better served if this Court would grant Certiorari and decide this issue?

III

THE DISTRICT COURT VIOLATED THE PETITIONER'S RIGHT TO A FAIR HEARING UNDER THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.

In affirming the District Court judgment against the Petitioner, the Sixth Circuit Panel summarily ignored the Constitution and the decisions of the Sixth Circuit governing the due process requirement of a "fair hearing" in a contempt proceeding. In *TWM Manufacturing Company, Inc., v. Dura Corp.*, 722 F2d 1261 (6th Cir., 1983) the 6th Cir. said: "In criminal contempt, willful diobedience must be proved beyond a reasonable doubt. Willfulness, for this purpose, implies a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation." For nearly ten years, the Petitioner had completely complied with the permanent injunction. In view of this alone, the District Court should have been chargeable with the inference of good faith by the Petitioner. The admittance into evidence of the Respondent's blank distributor agreement and policy statement, without prior notice to the Petitioner, was a flagrant violation of the Fifth Amendment right to Due Process. Moreover, the Court allowed the Respondent to use these documents to falsely represent that the violation of the injunction was not inadvertent but rather intentional.

The Court again denied the Petitioner a right to a fair hearing when it refused to admit the invoices of the Petitioner and ignored the request of the Petitioner's counsel to bring the store managers to Court to rebut the false accusations of the Respondent. The Court was apprised that the Petitioner had returned from Florida to Michigan to attend the Show Case. Is the Constitutional right to a fair hearing in a contempt proceeding merely within the discretion of a District Judge as the decision of the Panel indicates. We think not. In *Fuentes v.*

Shevin, 407 U.S. 81 this Court said "The constitutional right to be heard is a basic aspect of the duty of the government to follow a fair process of decision making when it acts to deprive a person of his possessions." The Court further said that "The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a persons property."

This Court has also said when the issue came before this Court as to what constituted a "fair and open hearing" by a committee of the Appellate Division of the New York Supreme Court for admission to the State Bar, this Court in *Willner v. Committee on Character,* 373 U.S. 95 (1962) said the requirement of fairness required that a party be fairly advised of what was to be heard by the goverment. In *Holt v. Virginia,* 381 U.S. 131 (1964), which involved contempt convictions of two attorneys, this court citing *In re Murchison*, 349 U.S. 133 said a "fair trial in a fair tribunal" is a basic requirement of Due Process. The right to a fair trial is the most basic protection the Constitution offers for preserving its guarantee of Due Process. This Court should not allow so flagrant a violation of this right to pass and grant Certiorari.

IV

THE DECISION OF THE SIXTH CIRCUIT PANEL IS GROUNDED ON MISSTATEMENTS OF MATERIAL FACTS AND FACTS NOT OF RECORD.

The Sixth Circuit Panel's decision omits material facts and contains misstatements of material facts and facts not of record. The first misstatement of fact is that

prior to the 1976 lawsuit, the Respondent granted the Petitioner a contractual right to sell its products. The truth of the matter is that there has never been a contractual relationship, such as a distributorship or dealership, between the Respondent and Petitioner. In 1977, the Petitioner consented to a judgment which enjoined the Petitioner from selling the Respondent's products marked "For Professional Use Only". The judgment did not prohibit the Petitioner from selling Respondent's retail products and he continued to do so with the knowledge of the Respondent after the judgment.

Another misstatement of fact is that the 1976 lawsuit involved the Respondent's trademarks. This was not so. The Petitioner has never violated the Respondent's trademarks by way of infringement, dilution or otherwise. None of the claims in the 1976 lawsuit involved a federal cause of action.

An assertion of fact not of record is that when Judge Guy returned the Petitioner's bond in 1979, he noted that the Respondent had reasonable concerns that they could be exposed to potential liability with the possible misuse of the product by nonprofessionals.

The decision of the Panel omits the fact that when Judge Guy returned the bond in 1979, he said there has been a sufficient penalty to cover the initial breech. Instead the decision states that the $25,000 bond in 1979 was a determination by the Court of an approximation of damages in the event the injunction was violated.

Another misstatement of fact is that the Court warned the Petitioner that if he failed to identify the Redken distributors who supplied his stores with products, it would affect the credibility of his defense and testimony. The decision fails to disclose that what the Petitioner was asked to do was to furnish Respondent's attorney with an affidavit listing all of the distributors who sold Levin Redken products since 1977. Since the Petitioner had not purchased any of the prohibited products since 1977, other than what was shipped in 1987 without order, this would have meant disclosure of the sellers of Redken's retail products which the injunction did not enjoin. After the Respondent disclosed its distributor agreement at the Hearing which threatened termination of distributorships for sales of the retail products, Petitioner was concerned that Respondent would retaliate against these distributors who sold him other products and injure his business relationships.

The decision omits the fact that the sales invoices which Petitioner offered into evidence were supplied by Redken's distributor, bore the names and address of the distributor and some were numbered. Respondent's distributor agreement provided Respondent with a right to audit a distributor's records. The Petitioner's attorney requested the opportunity to bring the store managers to Court but the Court ignored the request.

CONCLUSION

More than ten years ago, the Petitioner, a small independent retailer, stipulated to the entry of a consent

judgment which permanently enjoined the Petitioner from selling the Respondent's beauty products marked with the words "For Professional Use Only". After total compliance with the injunction for nearly 10 years, the Petitioner has been adjudged guilty of criminal contempt and assessed an excessive fine and ordered to post a substantial bond of an indefinite term and indefiniteconditions for its return other than compliance with a permanent injunction.

Moreover, constitutional issues exist with regard to whether State law should have been applied in imposing sanctions for the violation and whether the Petitioner was denied the due Process he was entitled to before the seizure of his property.

This Court should grant certiorari, restore the Petitioner's property, and provide additional guidance to the District Courts for contempt proceedings so that will not be brought and citizens will not be deprived of the due process guarantees of the Federal Constitution.

Respectfully submitted,

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Dated: July 13, 1988

APPENDIX A - FINAL JUDGMENT DATED JUNE 10, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REDKEN LABORATORIES, INC.,
Plaintiff,

v

Civil Action No. 671406
Ralph B. Guy, Jr.

HERB LEVIN, dba LEVIN BEAUTY SUPPLY, and LEVIN BEAUTY SUPPLY INC., a Michigan corporation,

Defendants.
_____/

FINAL JUDGMENT

Based upon the Stipulation re Entry of Final Judgment entered into on May 24, 1977 between plaintiff Redken Laboratories, Inc. and defendants Herb Levin, dba Levin Beauty Supply, and Levin Beauty Supply, Inc., and the facts therein stipulated to, it is hereby concluded that defendants have been engaging in all acts of unfair competition alleged in the First Claim of the Complaint on file herein. Therefore, it is hereby ordered:

1. That defendants Herb Levin, individually and doing business as Levin Beauty Supply, and Levin Beauty Supply, Inc., and their agents, servants, employees, and

all persons in active concert or participation with them be and they hereby are, permanently enjoined and restrained from directly or indirectly advertising, offering or sale or selling to any person, firm or corporation whomsoever any products manufactured by plaintiff Redken Laboratories,Inc. and explicitly formulated, designed and labeled "For Professional Use Only" or any products which bear any of plaintiff's trademarks or any reproduction, counterfeit copy or imitation thereof which are explicitly formulated, designed and labeled "For Professional Use Only", and that no monetary damages be assessed against defendant.

2. That the second Claim (including breach of contract) and Third Claim (conspiracy to defraud) of the Complaint on file herein be dismissed with prejudice.

3. That the Counterclaims of Defendants on file herein be dismissed with prejudice.

Dated: June 10, 1977.

RALPH B. GUY, JR.
United States District Judge

APPENDIX B - ORDER TO POST BOND DATED OCTOBER 12, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REDKEN LABORATORIES, INC.

Plaintiff,

v

.Civil Action
No. 6-71406

HERB LEVIN, d/b/a LEVIN BEAUTY SUPPLY and LEVIN BEAUTY SUPPLY, INC., a Michigan corporation,

Defendants.

ORDER

This motion came on for hearing before the Court, Honorable Ralph B. Guy, Jr., District Judge, presiding, on September 27, 1977, and the Court having duly heard and considered the evidence and the arguments presented by the attorneys representing the parties, having read and considered the briefs submitted by the parties, and the Court having filed an opinion wherein its findings and conclusions appear, and having found that defendant has violated the permanent injunction of this Court,

IT IS ORDERED,

that the defendant, Herb Levin, d/b/a Levin Beauty Supply and Levin Beauty Supply, Inc., is:

adjudged in contempt of this Court;

to pay to plaintiff, Redken Laboratories, Inc., costs in the amount of $350; and

to post a bond in the amount of $25,000 to the benefit of plaintiff, Redken Laboratories, Inc., within thirty days from the date of this order, conditioned upon defendant's not in the future violating the terms of the permanent injunction heretofore issued against defendant on June 10, 1977, enjoining defendant from selling any Redken "Professional Use Only" products.

Dated at Detroit, Michigan, this 12th day of October, 1977.

RALPH B. GUY, JR.
Federal District Judge

APPROVED AS TO FORM:

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Appendix B

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Attorneys for Plaintiffs

APPENDIX C - TRANSCRIPT OF JANUARY 10, 1979 HEARING ON MOTION TO RETURN BOND

Detroit, Michigan
Wednesday, January 10, 1979
P. M. Session

- - -

* * * * *

THE COURT: Very well, the Court is going to make this disposition of this matter.

It is going to allow the return of the bond money to the defendant.

The Court feels that there has been a sufficient penalty suffered to cover the initial breach.

I have no hesitancy whatsoever in, first of all, reminding both sides that there is a permanent injunction, and that gives the plaintiffs ready access to this Court at any time simply by seeking a show cause why the defendant shouldn't be held in contempt of the injunction. And in such matters, the Court would certainly expedite its hearing and treatment.

Secondly, the violation of the injunction initially so soon after its issuance was egregious conduct on the part of the defendant. And if there was any repetition of that, you could expect to be dealt with very harshly by this Court insofar as contempt citations because you had your one bite of the apple, and anything further would be construed as complete purposeful and wilfull disregard and disdain of the lawful orders of this Court and would be dealt with accordingly.

So I am going to allow you to get your bond back. But you had better tell your client that he absolutely will have to follow that injunction to the letter, or he will be in serious trouble.

Thank you, gentlemen.

MR. COHEN: Thank you, your Honor.

THE COURT: You will have to, of course, present an order to have the bond returned.

MR. COHEN: Thank you.

- - -

CERTIFICATE

I, Marian L. Olden, Official Court Reporter, do hereby certify that I reported in stenotype the foregoing proceedings had in open court in the within-entitled matter before the Honorable Ralph B. Guy, Jr., United States District Judge, at Detroit, Michigan, on Wednesday, January 10, 1979, and that the foregoing transcript, consisting of three (3) typewritten pages, constitutes a full, true and correct transcript of an excerpt of my said stenotype notes.

Marian L. Olden, R.P.R. - C.S.R.

Dated: Detroit, Michigan
January 18, 1979

APPENDIX D - OPINION AND ORDER DATED MARCH 27, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REDKEN LABORATORIES, INC.,
Petitioner,

v.

CASE NO. 76-CV-71406-DT
HON. BARBARA K. HACKETT

HERB LEVIN, d/b/a LEVIN
.BEAUTY SUPPLY, INC.
and LEVIN BEAUTY SUPPLY,
a Michigan corporation,
Respondents.

_____/

OPINION AND ORDER

This matter is before the court on petitioner Redken Laboratories' request for an order to show cause why respondents, the defendants in this action, Herb Levin and various business names and corporations under which Mr. Levin operates, should not be held in contempt of a June 10, 1977, injunction of this court which in substance enjoined Mr. Levin and those business enterprises from selling at retail any Redken Laboratory products which were designated "For Professional Use Only."

Petitioner's motion was heard by the court on March 25, 1987. The court had heard and consideredthe evidence and the arguments presented by attorneys

representing the parties. The court, further, has read and onsidered the briefs submitted by the parties and the record and has heard the testimony of Mr. Robert D. Allen, witness for plaintiff, and Mr. Herb Levin, witness on his own behalf and on behalf of the other defendants and has observed the demeanor of the witnesses and formed an opinion as to the credibility of their testimony.

he court finds by clear and convincing evidence that respondents have violated this court's permanent injunction entered in this action on June 10, 1977. The court further finds that defendant, Herb Levin, is responsible for those violations because he remains the owner of the defendant business and corporations through the managers. Accordingly,

IT IS ORDERED that the defendants are to pay to plaintiff, Redken Laboratories, Inc. an award of $25,000.00 for damages, plus actual attorney's fees, the expenses associated with bringing this matter before this court and costs; and,

IT IS FURTHER ORDERED that the defendants are to post a bond in the amount of $25,000.00 to the benefit of plaintiff, Redken Laboratories, Inc., within thirty (30) days from the date of this order, conditioned upon defendants not in the future violating the terms of the permanent injunction heretofore issued against defendants on June 10, 1977, enjoining defendants from selling any Redken "Professional Use Only" products.

s/Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated: March 27, 1987

APPENDIX E

OPINION DENYING MOTION FOR RECONSIDERATION DATED APRIL 21, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REDKEN LABORATORIES, INC.,

Petitioner,

v.

CASE NO. 76-CV-71046-DT
HON. BARBARA K. HACKETT

HERB LEVIN, d/b/a LEVIN BEAUTY SUPPLY, and LEVIN BEAUTY SUPPLY, INC., a Michigan corporation,

Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

On March 27, 1987, this court entered an opinion and order, finding the respondents in violation of the court's permanent injunction dated June 10, 1977, which enjoined respondents from selling at retail any of petitioner's products designated "For Professional Use Only." The matter is presently before the court on respondents' motion for rehearing, pursuant to Local Rule 17(m).

Appendix E

Respondents assert in their present motion that petitioner misrepresented to the court the source of professional use products sold by respondents and that respondents had no notice that the source of such items would be addressed at the hearing. Respondents further assert that they were unaware of the presence of the professional use items in their stores.

Respondents' present motion is governed by Local Rule 17(m), which provides in pertinent part:

> Generally and without restricting the discretion of the court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

In this case a full hearing was conducted in open court on the order to show cause initiated by petitioners. The court notes that respondents had ample notice of the purpose of the hearing and ample opportunity to produce witnesses. Respondents raise no new issues at this time. Accordingly,

IT IS ORDERED that respondents' motion for rehearing is denied.

s/ Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated April 21, 1987

APPENDIX F - DECISION OF THE COURT OF APPEALS FILED MARCH 29, 1988

No. 87-1363

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

REDKEN LABORATORIES, INC.,
Petitioner-Appellee,

v.

HERB LEVIN d/b/a Levin Beauty Supply and LEVIN BEAUTY SUPPLY, INC., a Michigan corporation,
Respondents-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 29, 1988

Before: KEITH, MARTIN and RYAN, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. Herb Levin, who does business as Levin Beauty Supply and Levin Beauty Supply, Inc., appeals an order prohibiting the sale of trademarked products and requiring Levin to pay Redken Laboratories, Inc. $25,000 in damages for violation of a permanent injunction, attorneys fees incurred by Redken in obtaining the order, and further requiring Levin to post a $25,000 bond for the benefit of Redken. The bond is conditioned upon Levin's future compliance with the permanent injunction.

Levin argues on appeal that the district court committed error when it: (1) refused to admit into evidence Levin's

"sales slips;" (2) admitted into evidence Redken's standard distributor agreement and professional services policy statement; (3) ruled that Levin's refusal to identify Redken distributors who had supplied Levin with Redken products was relevant; (4) decided to impose sanctions; and (5) imposed sanctions that were excessive and contrary to law. After a review of the relevant facts, we will address these contentions in order.

This case has its origins in 1976 when Redken sued Levin for unauthorized sales of Redken products. At that time, Redken also sought a permanent injunction prohibiting Levin from selling Redken products. Prior to that date, Redken had granted to Levin a contractual right to sell its products. These products, which were generally sold only in barber shops or beauty parlors, carried the Redken trademark and were properly registered under federal trademark laws. Redken could exercise complete control as to sales of these products. Furthermore, Redken could restrict its distributors from selling particular products to certain types of customers.

On May 24, 1977, Levin and Redken stipulated that all the facts in Redken's first claim against Levin were true. These facts were incorporated into the final judgment entered by the district court on June 10, 1977.

The stipulated Order stated that Levin had engaged in unfair competition by selling Redken "For Professional Use Only" products to the general public. The district court permanently enjoined Levin from advertising, offering for sale, or selling such products.

On October 12, 1977, Levin was found by the district court to have violated the permanent injunction. The court noted at that time that Redken not only had legitimate business reasons to seek the enforcement of the injunction, but they also had reasonable concerns that they could be exposed to potential liability with the possible misuse of the product by nonprofessionals. As a result, Levin was ordered to post a

bond of $25,000 for the benefit of Redken. The bond was "conditioned upon his [Levin's] not in the future violating the terms of this injunction or selling any Redken "Professional Use Only' products."

Slightly more than one year later, Levin successfully moved the district court for the return of the bond. On January 10, 1979, the district court granted Levin's motion, but warned Levin that:

> if there was any repetition of that [violation of the permanent injunction] you could expect to be dealt with very harshly by this court insofar as contempt citations because you had your one bite of the apple, and anything further would be construed as complete and purposeful and willful disregard and disdain of the lawful orders of this court and will be dealt with accordingly.

Despite the stern advice of the district court, Levin again violated the injunction in January 1987. On January 6, 1987, Robert D. Allen, Contract Compliance Manager for Redken, visited two stores owned by Levin. At the Levin Beauty Supply, Allen found Redken "For Professional Use Only" products for sale to the general public and was able to purchase four such products. That same day, Allen visited Levin Beauty Supply Outlet in West Bloomfield, Michigan, where he also found Redken "For Professional Use Only" products for sale to the general public. He again purchased four such products.

Because of what Allen had found, Redken petitioned the district court for an order to show cause as to why Levin should not again be held in contempt for violation of the permanent injunction. Redken's petition was granted and on March 25, 1987, a show cause hearing was held. Levin did not dispute that they had sold "For Professional Use Only" products in violation of the injunction. Rather, Levin attempted to argue that the products appeared on their

shelves inadvertently because of the negligence of Redken distributors who had incorrectly shipped to Levin the wrong products. The district court apparently disbelieved Levin's explanation and found Levin to have violated the permanent injunction and to be in contempt. Redken was awarded $25,000 in damages, plus its expenses in actual attorney's fees associated with obtaining the Order. Levin was also required to again post a $25,000 bond for the benefit of Redken, conditioned upon Levin's future compliance with the permanent injunction.

Before we turn to the assignments of error raised by Levin in this appeal, we observe that this is not a normal case under Rule 65 where a party was charged with violating an injunction of which he was unaware. Here, Redken early on obtained an injunction because of Levin's unauthorized sales of Redken trademarked and registered products. Levin knew of the injunction and yet continued to engage in their prohibited sale to the general public. Unlike ex parte temporary restraining orders under Rule 65(b), Federal Rules of Civil Procedure, which are often sought to stop the sale of unauthorized trademarked properties, often exacting manifest injustices on innocent and unidentified parties, and which are little tolerated by this court, this case represents the proper issuance and enforcement of an injunction under Rule 65(a) against an identified party who has continued to injure another's legislatively protected and registered rights and property. We turn now to the issues raised by Levin in this appeal.

As part of its defense, Levin sought to prove that it had not ordered "For Professional Use Only" products from any of its sources for Redken products. To accomplish this, Levin attempted to introduce into evidence an incomplete set of undated "sales slips" which did not designate any purported purchaser. We note that for a business record to be admissible under Rule 803(6), Federal Rules of Evidence, the record must satisfy four requirements: (1) it must have been made in the course of a regularly conducted business activity; (2)

it must have been kept in the regular course of that business; (3) the regular practice of that business must have been to have made the memorandum; and (4) the memorandum must have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258 (9th Cir. 1984). The sales slips offered by Levin do not come close to meeting these requirements. The sales slips were undated, did not indicate the customer to whom the goods were alleged to have been sold, were not in the custody of an employee charged with keeping the records, and, even more troubling, the defendants admitted that these slips were not all of the slips because "they don't save them all." We believe, therefore, that the district court was fully justified in excluding this evidence.

Levin's second assignment of error is that the district court erroneously admitted into evidence Redken's standard distributor agreement and professional services policy statements pursuant to Rule 403, Federal Rules of Evidence. We note, as an initial matter, that the decision of whether to admit evidence under Rule 403 is placed within the sound discretion of the trial judge. Thus, "a trial judge's ruling will not be overturned unless he has clearly abused his discretion." *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 335 (1986). We believe these documents were not unduly prejudicial and were certainly probative on the question of whether a Redken distributor may have inadvertently shipped the "For Professional Use Only" products. Because these documents demonstrate the consequences a distributor will suffer by shipping professional products to stores such as Levin's, it can be inferred that the distributor will be careful not to inadvertently make such shipments. We do not believe the district court judge abused its discretion in allowing these documents into evidence.

Levin's third assignment of error is that the district court was wrong to consider relevant Levin's refusal to identify Redken distributors who had supplied Levin with Redken products. During cross examination, Mr. Levin was asked the identity of the Redken distributors who had supplied his stores with Redken products since the issuance of the permanent injunction. The district court judge instructed Levin that he did not have to answer the question but warned that failing to do so would affect the credibility of his defense and testimony. Levin declined to answer the question after his counsel's objection to the question had been overruled. We believe this entire line of questioning was relevant, and it was proper for the court to consider Mr.Levin's refusal to answer. We agree with the district court and believe that this line of questioning was relevant to Levin's defense of inadvertent violation of the injunction, wherein he alleges that a Redken distributor caused the violation of the injunction.

Levin assigns as his fourth error the decision of the district court to impose sanctions for his violation of the permanent injunction. As we have noted in the past, "although civil contempt may serve incidentally to vindicate the court's authority, its primary purposes are to compel obedience to a court order and compensate for injuries cause by noncompliance." *Twin Mfg.Co. v. Dura Corp.*, 722 F.2d 1261, 1273 (6th Cir. 1983), *cert. denied*, 107 S. Ct. 183 (1986). We do not believe there is any basis to the argument that the district court abused its discretion in imposing sanctions upon Levin. We also reject Levin's fifth assignment of error, that the sanctions were excessive. Levin has known the consequences of a subsequent violation of the permanent injunction from the time the district court granted Levin's motion for return of the $25,000 bond in 1978. The award of $25,000 to Levin is in accord with the district court's determination nearly ten years ago, when it ordered Levin to post a $25,000 bond, as an approximation of the damages that would be sustained by Redken in the event of Levin violating the injunction. The

award is proper today. We also note that "the award of attorney's fees and expenses to a successful movant may be appropriate in a civil contempt proceeding." *Twin*, 722 F.2d at 1273. Finally, we uphold the decision of the district court ordering Levin to post a $25,000 bond to the benefit of Redken, conditioned upon Levin's future adherence to the permanent injunction. This bond is identical to the one first imposed by the district court in 1977 for violation of the permanent injunction.

For the reasons above, the decision of the district court is hereby affirmed.

APPENDIX G - CORRECTED PAGE OF COURT OF APPEALS DECISION

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APPENDIX H - ORDER DENYING PETITION FOR REHEARING EN BANC FILED MAY 16, 1988

No. 87-1363

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REDKEN LABORATORIES, INC.,

Petitioner-Appellee,

v. **ORDER**

HERB LEVIN, d/b/a LEVIN BEAUTY, SUPPLY and LEVIN BEAUTY SUPPLY, INC., a Michigan Corporation,

Respondents-Appellants

BEFORE: KEITH, MARTIN and RYAN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

Appendix H

The panel has further reviewed the petition for rehearing and concludes that the issues raised in thepetition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

L/S

John P. Hehman, Clerk